

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

In re Application of: John F. Wakerly
Serial No.: 10/669,624
Filing Date: September 24, 2003
Group Art Unit: 2446
Examiner: Benjamin R. Bruckart
Confirmation No.: 5626
Title: PARTITIONED PACKET PROCESSING IN A
MULTIPROCESSOR ENVIRONMENT

Mail Stop Notice of Appeal
Commissioner of Patents
P.O. Box 1450
Alexandria, VA 22313-1450

Dear Sir:

PRE-APPEAL BRIEF REQUEST FOR REVIEW

The following Pre-Appeal Brief Request for Review is being filed in accordance with the provisions set forth in the Official Gazette Notice of July 12, 2005 ("OG Notice"). Pursuant to the OG Notice, this Request is being filed concurrently with a Notice of Appeal.

REMARKS

In a final Office Action dated January 16, 2009 (“*Final Office Action*”) and an Advisory Action dated March 25, 2009 (“*Advisory Action*”) Claims 1, 3-20, 22-38, and 40-47 were rejected. Applicant seeks review of the rejection of Claim 6. Applicant does not seek review in this Request of the rejections of Claims 1, 3-5, 7-20, 22-38, and 40-47. Applicant requests a finding that the rejection of Claim 6 is improper.

Rejection Under 35 U.S.C. § 103

The Examiner rejects Claim 6 under 35 U.S.C. § 103(a) as unpatentable over U.S. Patent Application No. 2003/0069920 to Melvin et al. (“*Melvin*”) in view of U.S. Patent No. 6,684,395 to Johnson et al. (“*Johnson*”) and in view of U.S. Patent No. 6,836,808 to Bunce et al. (“*Bunce*”). Applicant respectfully traverses this rejection and submits that *Melvin*, *Johnson*, and *Bunce*, whether taken alone or in combination, fail to teach or suggest each and every limitation of Claim 6.

For example, *Melvin*, *Johnson*, and *Bunce*, both alone and in combination, fail to disclose, teach, or suggest a context manager operable to “determine that the queue associated with the target code partition is empty and, in response, to bypass the queue by communicating the packet context information to the available one of the processors,” as recited by Claim 6. The Examiner concedes that the cited references do not disclose this limitation and states that the cited references “do not expressly disclose bypassing the queue when the queue is empty.” *Final Office Action*, p. 6. However, the Examiner argues “this is well known and expected in processing systems. By this rational, ‘Official Notice’ is taken that both the concepts and advantages of providing for queue bypass is well known and expected in the art.” *Final Office Action*, p. 6.

Applicant has already documented at length their traversal of the Examiner’s use of such Official Notice in rejecting several of the claims of the present Application (including, at least, Claims 5, 6, 10, 16, and 17) as improper pursuant to M.P.E.P. § 2144.03. Applicant repeatedly requested that the Examiner provide evidence in support of the Examiner’s use of Official Notice.¹ For example, Page 13 of Applicant’s Response transmitted June 30, 2008 states:

¹ For example, the first page of Applicant’s Remarks (Page 13) in Applicant’s Responses transmitted June 30, 2008, November 12, 2008, and March 16, 2009 addresses the Examiner’s use of Official Notice.

the Examiner's use of such Official Notice is improper pursuant to M.P.E.P. § 2144.03(A), and any rejection relying on such Official Notice is legally deficient. Furthermore, Applicant respectfully requests that, if the Examiner intends to continue to rely on any form of Official Notice to reject any of the claims of this Application, the Examiner provide a signed affidavit attesting to the subject matter of the Examiner's Official Notice as required by M.P.E.P. § 2144.03.

Applicant maintains that the Examiner has not provided any evidence for the Examiner's use of such Official Notice. Therefore, the Examiner's rejection of Claim 6 based on the assertion that "providing for queue bypass is well known and expected in the art" is legally and procedurally deficient. For at least these reasons the rejection of Claim 6 under 35 U.S.C. § 103(a) is improper.

In the Advisory Action, the Examiner insists that Applicant somehow failed to seasonably challenge the Examiner's use of Official Notice and therefore Applicant has admitted that "the claim limitations the Examiner considered as 'well known' in the first Office Action are now established as admitted prior art of record for the course of the prosecution." *Advisory Action*, p. 2. Applicant respectfully disagrees that Applicant failed to seasonably challenge the Examiner's use of such Official Notice and Applicant certainly does not admit that the claim limitations are now established as admitted prior art.

Applicant notes that the case cited in the Advisory Action does not support the Examiner's contention that Applicant failed to seasonably challenge the Examiner's use of such Official Notice. *See* M.P.E.P. § 2144.03(C) citing *Chevenard*, 139 F.2d at 713, 60 U.S.P.Q. at 241. Rather, the Court stated, "In the absence of anything in the record to contradict the examiner's holding, ***and in the absence of any demand by appellant for the examiner to produce authority for his statement***, we will not consider this contention." *In re Chevenard*, 139 F.2d 711, 713, 60 U.S.P.Q. 239, 241 (C.C.P.A. 1943) (emphasis added). As described above, Applicant clearly made such a demand to produce authority (repeatedly) in this case. Therefore, Applicant respectfully maintains that the Official Notice taken by the Examiner was improper and the Examiner's position that Applicant failed to seasonably challenge the Examiner's use of such Official Notice is misguided.

Moreover, even assuming for the sake of argument only that the Official Notice was proper, Applicant maintains that the cited references fail to teach or suggest each and every limitation of Claim 6.

For example, *Melvin*, *Johnson*, and *Bunce*, both alone and in combination, fail to disclose, teach, or suggest a context manager operable “in response to the migration request, to identify an available one of the processors having the target code partition loaded,” as recited by Claim 1 from which Claim 6 depends. The Examiner concedes that “*Melvin* does not disclose the loading and unloading of code partitions.” *Final Office Action*, p. 12. Instead, the Examiner asserts that “one of ordinary skill in the art would clearly understand that if a processor is available, it inherently has the code partition loaded.” *Final Office Action*, p. 12. Applicant respectfully submits that a non-busy processor with a code partition loaded does not teach or suggest identifying an available processor having a **target code partition included in a migration request**. *Johnson* and *Bunce* fail to remedy the deficiencies of *Melvin*. As a result, the proposed *Melvin*, *Johnson*, and *Bunce* combination fails to disclose a context manager operable “in response to the migration request, to identify an available one of the processors having the target code partition loaded.”

For at least the additional reasons above, Applicant respectfully contends that Claim 6 is patentably distinguishable from the cited references. Thus, Applicant respectfully submits that, at a minimum, the rejection of Claim 6 under 35 U.S.C. § 103(a) is improper.

CONCLUSION

As the rejections of Claim 6 contain clear legal and factual deficiencies, Applicant respectfully requests a finding of allowance of Claim 6. If the PTO determines that an interview is appropriate, Applicant would appreciate the opportunity to participate in such an interview. To the extent necessary, the Commissioner is hereby authorized to charge any required fees or credit any overpayments to **Deposit Account No. 02-0384 of Baker Botts L.L.P.**

Respectfully submitted,

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Date: April 16, 2009

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